Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-107–04 OF 2016
TENGKU MAIMUN, ABDUL RAHMAN SEBLI AND ZALEHA YUSOF JJCA
16 MAY 2017

Administrative Law — Judicial review — Ambit — Respondent issued circular exempting graduates who had obtained First Class Honours in Bachelor's Degrees in private institutions of higher learning from repaying their study loans provided their courses had been accredited by the National Accreditation Board — Respondent rejected appellant's application for exemption on ground her course was accredited only after her graduation and not during her period of study — Respondent's circular made no mention of time when accreditation must have been obtained — Whether respondent's decision amenable to judicial review — Whether respondent's decision irrational and unreasonable and went against policy behind circular of rewarding excellence in students — Whether respondent's reason for decision based on a condition that was not in its circular

The appellant had obtained a study loan from the respondent to pursue a University of London Bachelor of Laws degree course ('the LLB course') at a local private institution of higher learning ('PIHL'). She graduated in the year 2002 with a First Class Honours. In 2003, the respondent issued a circular ('the 2003 circular') which exempted graduates who had obtained First Class Honours in any bachelor's degree from repaying their loans ('the exemption'). For PIHL students, the additional condition was that their courses had to have the accreditation of the National Accreditation Board ('LAN')/Malaysian Qualifications Agency ('MQA'). The circular required graduates who wished to apply for the exemption to forward to the respondent certified true copies of their degree as well as the examination results for their course semesters. In accordance with the circular, the appellant applied for the exemption but received no response from the respondent. Three years later, the appellant received a letter from the respondent requesting repayment of her study loan. After the respondent's attention was drawn to the fact that the appellant had applied for the exemption, the respondent rejected the application on the ground LAN had not accredited the LLB course during the period of the appellant's study but only after she had graduated. The respondent rejected the appellant's appeals to reconsider its decision and proceeded to obtain a court judgment against her for non-repayment of her study loan. Pursuant to a certificate issued by the respondent under s 22A of the Perbadanan Tabung Pendidikan Tinggi Nasional Act 1997 ('the PTPTN Act') to the Director

General of Immigration, the appellant was barred from leaving the country. The High Court in dismissing the appellant's judicial review application to quash the respondent's decision to reject her application for the exemption held that the appellant was not entitled to the benefit of the 2003 circular because the LLB course was not given a certificate of accreditation by LAN during the course of her study. The ourt also ruled that the appellant was seeking to quash a government policy decision and the court could not decide on the appropriateness or adequacy of a governmental policy decision. In the instant appeal against the High Court's verdict, the appellant argued that she was not challenging any policy decision of the government but its implementation by the respondent. The appellant said that the respondent's decision to reject her application for exemption was arbitrary and irrational because the 2003 circular did not require the accreditation of the LLB course to have been made during the course of the appellant's study. In an earlier stage of the proceedings, a different panel of the Court of Appeal had decided, inter alia, that the 2003 circular had the force of law as it was made pursuant to the PTPTN Act and that the circular was thereby a subsidiary legislation binding on the parties and that as such the respondent's decision was amenable to judicial review.

Held, allowing the appeal:

(1) The respondent's decision in rejecting the appellant's application for exemption on the ground that the certificate of accreditation was not obtained during the period of the appellant's study (when the 2003 circular was completely silent on when the certificate was to be obtained) went against the literal and plain reading of the 2003 circular. The respondent, in effect, had added an extra condition or requirement to the 2003 circular, namely that the exemption could only apply to graduates who had undergone their studies after the certificate of accreditation had been issued. On the facts and in the context of the instant appeal, the respondent's decision was irrational and unreasonable (see paras 53–54).

(2) In its plain and literal meaning, the 2003 circular stipulated only two conditions to be fulfilled before a graduate of a private institution of higher learning could enjoy the exemption. First, the graduate must have obtained a First Class Honours. Secondly, the graduate must have attended a course which had attained a certificate of accreditation. No other conditions were stipulated in the circular. The 2003 circular made no provision with regard to the time when the certificate of accreditation was obtained. Also, nowhere in its earlier letters to the appellant or to the Public Complaints Bureau did the respondent mention any requirement that the accreditation must have been obtained during the appellant's period of study (see paras 37, 40, 42 & 44).

(3) If it had been the intention of the respondent that the accreditation must relate to the period of study, the respondent would have expressly

provided for such a requirement in the 2003 circular. In the absence of such requirement, it had to be concluded that it was not the respondent's intention that the accreditation must relate to the whole period of study. What was intended was that the course itself must attain the accreditation. Having regard to the factual matrix and the spirit of the formulation of the policy, ie, to give recognition to excellent graduates, the focus should be on the fact that the accreditation must relate to the course itself and not to the period when the graduate was attending the course. To focus on the date when the certificate of accreditation was obtained would result in unfairness and an absurd situation. For example, going by the respondent's interpretation of the 2003 circular, if the certificate of accreditation covered only part of a graduate's period of study, he/she would not be exempted as the accreditation was not attained 'sepanjang tempoh pelajar menjalani kursus'. Surely that could not have been the intention of the government when the policy 'memberi pengiktirafan kepada pelajar cemerlang' was introduced. There was only one LLB course and it was not rational to sever the course, more so when accreditation was only a formal recognition as defined in s 2 of the Lembaga Akreditasi Negara Act 1996. The fact that the appellant was granted the study loan necessarily meant that the LLB course had in fact been approved by LAN (see paras 47–49).

(4) This court disagreed with the High Court that the decision of the respondent was a policy decision and that the court ought not to intervene in a policy decision. The instant appeal was not concerned with policy per se but with the implementation of policy. The respondent's interpretation of the 2003 circular deprived the appellant of the benefit of the exemption. There was no basis to depart from the earlier findings of this court that the decision of the respondent was susceptible to judicial review. In giving its decision on the exemption of repayment of the study loan, the respondent was exercising its statutory duty under s 19 and/or s 49(1) of the PTPTN Act (see paras 34–35).

[Bahasa Malaysia summary

Perayu telah memperoleh suatu pinjaman pengajian daripada pihak responden untuk melanjutkan pengajian dalam bidang kursus Sarjana Muda Undang-Undang ('kursus undang-undang') di sebuah institusi pengajian tinggi swasta tempatan ('IPTS'). Beliau telah menamatkan pengajian pada tahun 2002 dengan mendapat Kepujian Kelas Pertama. Pada 2003, pihak responden telah mengeluarkan suatu pekeliling ('pekeliling 2003') yang mengecualikan graduan yang telah mendapat kepujian kelas pertama dalam mana-mana ijazah sarjana muda daripada membayar pinjaman ('pengecualian'). Bagi pelajar IPTS, syarat tambahan ke atas mereka ialah kursus mereka hendaklah mempunyai sijil akreditasi daripada Lembaga Akreditasi Nasional ('LAN')/Agensi Kelayakan Malaysia ('AKM'). Pekeliling

itu juga menghendaki graduan yang berhasrat untuk memohon pengecualian untuk mengemukakan salinan diakui sah ijazah mereka termasuklah keputusan peperiksan bagi semester kursus mereka kepada responden. Berdasarkan kepada pekeliling itu, perayu telah memohon pengecualian tetapi tidak menerima apa-apa maklum balas daripada responden. Tiga tahun kemudian, perayu telah menerima surat daripada responden yang meminta supaya perayu membayar pinjaman pengajiannya. Setelah responden dimaklumkan tentang permohonan pengeculian yang dibuat oleh perayu, responden telah menolak permohonan itu atas alasan pihak LAN tidak mengakreditasikan kursus undang-undang itu semasa tempoh pengajian perayu tetapi hanya mengakreditasikan kursus undang-undang itu setelah perayu tamat pengajian. Pihak responden menolak rayuan perayu untuk mempertimbangkan semula keputusan responden dan seterusnya membuat tindakan untuk mendapatkan suatu penghakiman mahkamah terhadap perayu kerana gagal membayar semula pinjaman pengajian perayu. Menurut suatu sijil yang dikeluarkan oleh responden di bawah s 22A Akta Perbadanan Tabung Pendidikan Tinggi Nasional 1997 ('Akta PTPTN') kepada Ketua Pengarah Imigresen, perayu telah dihalang daripada meninggalkan negara. Mahkamah Tinggi, semasa menolak permohonan semakan kehakiman oleh perayu untuk mengenepikan keputusan responden menolak permohonan pengeculian oleh perayu, memutuskan bahawa perayu tidak berhak untuk mendapatkan manfaat daripada pekeliling 2003 itu kerana kursus undang-undang itu tidak diberikan sijil akreditasi oleh LAN semasa tempoh pengajian perayu. Mahkamah juga memutuskan bahawa perayu hendak mengenepikan suatu keputusan polisi kerajaan dan mahkamah tidak boleh membuat keputusan tentang ketepatan dan kewajaran suatu keputusan polisi kerajaan. Dalam rayuan ini terhadap keputusan Mahkamah Tinggi, perayu menghujahkan bahawa beliau bukanlah mencabar apa-apa keputusan polisi kerajaan tetapi mencabar pelaksanaan polisi itu oleh responden. Pihak perayu menyatakan bahawa keputusan responden untuk menolak permohonan pengecualian oleh perayu adalah suatu keputusan yang dibuat sewenang-wenangnya dan tidak rasional kerana pekeliling 2003 itu tidak menghendaki akreditasi kursus undang-undang dibuat semasa tempoh pengajian perayu. Dalam peringkat awal prosiding ini, suatu panel Mahkamah Rayuan yang lain telah memutuskan, antaranya, bahawa pekeliling 2003 itu mempunyai kuasa perundangan kerana ia dibuat menurut Akta PTPTN dan bahawa pekeliling itu merupakan suatu perundangan subsidiari yang mengikat pihak-pihak dan oleh itu keputusan responden tertakluk kepada semakan kehakiman.

Diputuskan, membenarkan rayuan:

(1) Keputusan responden untuk menolak permohonan perayu untuk pengecualian atas alasan sijil akreditasi tidak diperoleh semasa tempoh pengajian perayu (pada ketika pekeliling 2003 itu tidak menyatakan

dengan jelas bila sijil akreditasi hendaklah diperoleh) telah melanggar pembacaan literal dan terus pekeliling 2003 itu. Pihak responden telah menambah syarat tambahan atau kehendak kepada pekeliling 2003 itu, iaitu pengecualian itu hanya terpakai kepada graduan yang telah menjalani pengajian mereka selepas sijil akreditasi telah dikeluarkan. Berdasarkan fakta dan konteks rayuan ini, keputusan responden adalah tidak rasional dan tidak munasabah (lihat perenggan 53–54).

(2) Dalam maksud yang nyata dan literal, pekeliling 2003 itu menyatakan dua syarat untuk dipenuhi sebelum seseorang graduan IPTS layak mendapat pengecualian. Pertama, graduan hendaklah memperoleh Kepujian Kelas Pertama. Kedua, graduan hendaklah menghadiri kursus yang telah mendapatkan sijil akreditasi. Tiada syarat lain yang dinyatakan dalam pekeliling itu. Pekeliling 2003 tidak mengandungi apa-apa peruntukan berkenaan dengan masa sijil akreditasi itu hendak diperoleh. Selain itu, apa-apa kehendak supaya akreditasi hendaklah diperoleh semasa tempoh pengajian perayu tidak dinyatakan dalam surat awal responden kepada perayu atau kepada Biro Pengaduan Awam (lihat perenggan 37, 40, 42 & 44).

(3) Jika memang menjadi niat responden bahawa akreditasi itu mesti berkait dengan tempoh pengajian, sudah tentu pihak responden akan menyatakan dengan jelas tentang kehendak itu dalam pekeliling 2003 itu. Dalam ketiadaan kehendak itu, maka hendaklah dirumuskan bahawa responden tidak berniat bahawa akreditasi itu hendaklah berkait dengan keseluruhan tempoh pengajian. Apa yang dihasratkan ialah kursus itu sendiri yang mesti mendapat akreditasi. Mengambil kira kepada fakta matriks dan hasrat pengwujudan polisi iaitu untuk memberi pengiktirafan kepada graduan cemerlang, tumpuan harus diberikan kepada fakta bahawa akreditasi itu hendaklah berkait dengan kursus itu sendiri dan bukan kepada tempoh semasa graduan menghadiri kursus itu. Untuk memfokuskan kepada tarikh bila sijil akreditasi itu diperoleh akan menyebabkan ketidakadilan dan situasi yang tidak munasabah. Contohnya, dengan menggunakan tafsiran responden tentang pekeliling 2003 itu, jika sijil akreditasi itu hanya terpakai kepada tempoh pengajian graduan, graduan itu tidak akan dikecualikan memandangkan akreditasi itu tidak diperoleh 'sepanjang tempoh pelajar menjalani kursus'. Sudah tentu itu bukan hasrat kerajaan semasa polisi 'memberi pengiktirafan kepada pelajar cemerlang' diperkenalkan. Hanya terdapat satu sahaja kursus undang-undang dan adalah tidak rasional untuk menghapuskan kursus itu, lebih-lebih lagi apabila akreditasi hanyalah suatu pengiktirafan rasmi sebagaimana yang ditafsirkan dalam s 2 Akta Lembaga Akreditasi Negara 1996. Fakta bahawa perayu telah diberikan pinjaman pelajaran menunjukkan bahawa kursus undang-undang itu telahpun diluluskan oleh LAN (lihat perenggan 47–49).

(4) Jika memang menjadi niat responden bahawa akreditasi itu mesti berkait dengan tempoh pengajian, sudah tentu pihak responden akan menyatakan dengan jelas tentang kehendak itu dalam pekeliling 2003 itu. Dalam ketiadaan kehendak itu, maka hendaklah dirumuskan bahawa responden tidak berniat bahawa akreditasi itu hendaklah berkait dengan keseluruhan tempoh pengajian. Apa yang dihasratkan ialah kursus itu sendiri yang mesti mendapat akreditasi. Mengambil kira kepada fakta matriks dan hasrat pengwujudan polisi iaitu untuk memberi pengiktirafan kepada graduan cemerlang, tumpuan harus diberikan kepada fakta bahawa akreditasi itu hendaklah berkait dengan kursus itu sendiri dan bukan kepada tempoh semasa graduan menghadiri kursus itu. Untuk memfokuskan kepada tarikh bila sijil akreditasi itu diperoleh akan menyebabkan ketidakadilan dan situasi yang tidak munasabah. Contohnya, dengan menggunakan tafsiran responden tentang pekeliling 2003 itu, jika sijil akreditasi itu hanya terpakai kepada tempoh pengajian graduan, graduan itu tidak akan dikecualikan memandangkan akreditasi itu tidak diperoleh 'sepanjang tempoh pelajar menjalani kursus'. Sudah tentu itu bukan hasrat kerajaan semasa polisi 'memberi pengiktirafan kepada pelajar cemerlang' diperkenalkan. Hanya terdapat satu sahaja kursus undang-undang dan adalah tidak rasional untuk menghapuskan kursus itu, lebih-lebih lagi apabila akreditasi hanyalah suatu pengiktirafan rasmi sebagaimana yang ditafsirkan dalam s 2 Akta Lembaga Akreditasi Negara 1996. Fakta bahawa perayu telah diberikan pinjaman pelajaran menunjukkan bahawa kursus undang-undang itu telahpun diluluskan oleh LAN (lihat perenggan 47–49).]

Notes

For cases on ambit, see 1(1) *Mallal's Digest* (5th Ed, 2015) paras 303–306.

Cases referred to

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145, FC (folld)

Council of Civil Service Unions and others v Minister for the Civil Service [1984] 3 All ER 935; [1985] AC 374, HL (refd)

Dr Michael Jeyakumar Devaraj v Peguam Negara Malaysia [2013] 2 MLJ 321; [2013] 2 CLJ 1009, FC (refd)

Marcel Jude Joseph v The Minister of Education, Ministry of Education, Malaysia [2012] 4 MLJ 555; [2013] 1 CLJ 1106, HC (refd)

Merdeka University Berhad v Government of Malaysia [1981] 2 MLJ 356; [1981] CLJ Rep 191 (refd)

Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional [2015] MLJU 213; [2015] 3 AMR 35, CA (refd)

Legislation referred to

Lembaga Akreditasi Negara Act 1996 s 2
Perbadanan Tabung Pendidikan Tinggi Nasional Act 1997 ss 19, 22A, 49, 49(1), 49A

Appeal from: Application For Judicial Review No 25–98–05 of 2014 (High Court, Kuala Lumpur)

Irwin Lo (Adelin Phung with him) (Lo Chambers) for the appellant.
Hazizah Kassim (Nurul Fathihah bt Zainal Abidin with her) (Hazizah & Co) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] This appeal concerned the interpretation of a circular issued by the Perbadanan Tabung Pendidikan Tinggi Nasional ('PTPTN'), namely Pekeliling PTPTN Bilangan 2 Tahun 2003 ('the 2003 circular'). For the reasons that follow, we had resolved the interpretation in favour of the appellant and as a consequence, had allowed the appellant's appeal.

THE BACKGROUND FACTS

[2] The appellant obtained an educational loan from PTPTN ('the respondent') to pursue a degree in law ('the LLB course') from the University of London at a private institute of higher learning known as Kemayan Advance Tertiary College ('Kemayan ATC'). The appellant graduated in 2002 with a First Class Honours.

[3] In 2003, the respondent issued the 2003 circular which reads:

> PEKELILING PTPTN BILANGAN 2 TAHUN 2003
>
> PERLAKSANAAN PELEPASAN BAYARAN BALIK PINJAMAN PENDIDIKAN BAGI PELAJAR-PELAJAR YANG MENDAPAT KEPUJIAN KELAS PERTAMA
>
> Adalah dimaklumkan bahawa PTPTN telah melaksanakan dasar pinjaman boleh ubah untuk pelajar-pelajar Institut Pendidikan Tinggi Awam (IPTA) dan Institut Pendidikan Tinggi Swasta (IPTS) peringkat Ijazah Sarjana Muda yang mendapat keputusan Kepujian Kelas Pertama. Walau bagaimanapun untuk pelajar-pelajar IPTS, hanya terhad kepada pelajar-pelajar yang mengikuti kursus yang mendapat Sijil Perakuan Akreditasi daripada Lembaga Akreditasi Negara (LAN), Kementerian Pendidikan Malaysia.
>
> 2. Untuk membolehkan surat pelepasan bayaran balik dikeluarkan, pelajar-pelajar berkaitan dikehendaki mengemukakan kepada PTPTN dokumen-dokumen berikut yang telah disahkan oleh Bahagian Akademik IPTA atau IPTS masing-masing:

(i) Salinan keputusan peperiksaan setiap semester pengajian.

(ii) Salinan Ijazah Kepujian Kelas Pertama.

3. Pelajar-pelajar yang menerima penajaan lain di samping pinjaman PTPTN, menukar jurusan, peringkat pengajian dan IPT tanpa kelulusan PTPTN atau melanggar mana-mana syarat yang ditetapkan dalam perjanjian pinjaman pendidikan, tidak akan dipertimbangkan untuk kemudahan pelepasan bayaran balik pinjaman.

[4] By a letter dated 5 August 2003 to the respondent, the appellant applied that she be exempted from paying the educational loan.

[5] The appellant's letter dated 5 August 2003 was acknowledged receipt by the respondent on 7 August 2003.

[6] Nothing happened on the appellant's application until about three years later when the appellant received a letter dated 19 June 2006 from the respondent requesting for repayment of the educational loan.

[7] The appellant responded to the request for repayment through a letter dated 2 July 2006 making reference to her application in August 2003 for exemption of repayment. The appellant also referred the matter to the Public Complaints Bureau of the Prime Minister's Department.

[8] Notwithstanding the respondent's rubber stamp affixed on the appellant's letter dated 5 August 2003, the respondent claimed that it had never received the appellant's application. By its reply to Public Complaints Bureau dated 31 July 2006, the respondent informed the Public Complaints Bureau that it had only received the appellant's application on 5 July 2006. The Public Complaints Bureau was further informed that any borrower who had applied for a loan before 1 July 2005 and had obtained a First Class Honours may apply for the exemption from repayment of the educational loan.

[9] On 25 July 2006, the respondent informed the appellant that 'didapati permohonan tuan tidak lengkap/silap pengesahan'. The appellant was requested to submit the supporting documents.

[10] The appellant resubmitted the application to the respondent on 21 August 2006.

[11] On 13 September 2006, the respondent rejected the appellant's application on the ground that the LLB course attended by the appellant did not attain the certificate of accreditation. On 5 October 2006, the respondent

informed the Public Complaints Bureau that the appellant's application could not be processed as the appellant did not produce a copy of the certificate of accreditation.

[12] Acting on the respondent's letter to the Public Complaints Bureau, the appellant vide her letter dated 19 August 2007 produced the certificate of accreditation to the respondent.

[13] On 24 September 2007, the respondent rejected the appellant's application, reason being that the certificate of accreditation was not issued during the appellant's study.

[14] The appellant appealed against the rejection. By its letter dated 27 October 2009, the respondent affirmed the rejection.

[15] The appellant again appealed vide a letter dated 15 September 2011 which was acknowledged receipt by the respondent on 23 September 2011. More than two years later and after a series of emails from the appellant asking for the status of her appeal, the respondent by a letter dated 12 February 2014 informed the appellant that 'permohonan bayaran balik Puan tidak dapat dipertimbangkan kerana kursus yang mendapat perakuan Akreditasi dari Agensi Kelayakan Malaysia (MQA) sahaja yang dapat dipertimbangkan'.

[16] In the meantime in 2010, the respondent filed a civil suit in the Sessions Court at Kuala Lumpur for repayment of the educational loan. A judgment in default was obtained against the appellant. Consequent thereto, the appellant was blacklisted. Pursuant to a certificate issued by the respondent to the Director General of Immigration under s 22A of the Perbadanan Tabung Pendidikan Tinggi Nasional Act 1997 ('the PTPTN Act'), the appellant was prevented from leaving the country.

THE JUDICIAL REVIEW APPLICATION

[17] In the High Court, the appellant sought leave to file judicial review to quash the respondent's decision on the ground among others that the respondent had acted without jurisdiction and/or outside jurisdiction. Some of the reasons given why the respondent was said to have acted without or outside jurisdiction were the following:

(a) the rejection of the appellant's appeal despite the appellant having obtained the Degree of Laws with First Class Honours;

(b) the imposition or interpretation of a condition which contradicted its own action; and

(c) the imposition of the additional condition and/or requirement to prevent the appellant from benefitting from the exemption for repayment provision under the 2003 circular.

[18] Leave was refused by the High Court. On appeal to this court, the appeal was allowed and the matter was remitted to the High Court for hearing of the substantive application.

[19] On the hearing of the substantive application, the learned High Court judge considered the law on judicial review and reminded herself that the review is restricted to the decision-making process and not the merits or the correctness of the decision. The learned judge further reminded herself of the settled law that to qualify as a subject for judicial review, the decision, action and/or omission must have the effect of altering the rights or obligations of the appellant and must have deprived the appellant of some benefit or advantage.

[20] In determining whether the respondent's decision was tainted with illegality, irrationality or procedural impropriety as described by Lord Diplock in *Council of Civil Service Unions and others v Minister for the Civil Service* [1984] 3 All ER 935; [1985] AC 374, the learned judge took into account the fact that the appellant graduated with a First Class Honours on 1 August 2002 and that the certificate of accreditation attained by Kemayan ATC was with effect from 27 February 2006 and valid up to 26 February 2011. Since at the time the appellant graduated with a First Class Honours Degree in Laws, the said course has not yet been accorded with the certificate of accreditation by LAN, Her Ladyship concluded that the appellant was not entitled to the benefit of the 2003 circular.

[21] Her Ladyship also considered the letter from LAN/Malaysian Qualifications Agency ('MQA') which confirmed that the certificate of accreditation issued to the LLB Course at Kemayan ATC did not have retrospective effect.

[22] Relying on *Marcel Jude Joseph v The Minister of Education, Ministry of Education, Malaysia* [2012] 4 MLJ 555; [2013] 1 CLJ 1106; *Dr Michael Jeyakumar Devaraj v Peguam Negara Malaysia* [2013] 2 MLJ 321; [2013] 2 CLJ 1009 and *Merdeka University Berhad v Government of Malaysia* [1981] 2 MLJ 356; [1981] CLJ Rep 191 the learned judge further held that the decision which the appellant was seeking to quash involved a policy decision and that the court would not be in a position to decide on the appropriateness or adequacy of any particular policy of the government.

[23] Having found that the decision of the respondent was not tainted with illegality and/or irrationality and/or procedural impropriety to merit curial intervention, the judicial review application was dismissed.

[24] Aggrieved by the decision, the appellant appealed to this court and as indicated at the outset, we had allowed the appeal.

THE APPEAL

[25] Learned counsel for the appellant submitted that the learned judge erred in law and in fact in holding that the impugned decision is a policy consideration matter which was not amenable to judicial review. According to learned counsel, the appellant has no dispute with regards to the policy but the appellant's complaint is that the respondent has failed to interpret and apply the policy appropriately. In other words, the challenge was not on the policy itself but on the implementation of the policy.

[26] Learned counsel argued that the 2003 circular, as decided by this court in the appeal concerning the leave, is amenable to judicial review if it contains sufficient element of public law. And to determine whether it contains sufficient element of public law, guidance is found in the decision of the Federal Court in *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145 that 'it is necessary to examine both the source of power and nature of the decision made'.

[27] In the instant appeal, the impugned decision was made pursuant to the 2003 circular. The 2003 circular has legislative effect as it was enacted pursuant to s 19 and/or s 49 of the PTPTN Act and it is regarded as a subsidiary legislation as termed in s 49A of the PTPTN Act and has a force of law.

[28] Learned counsel for the appellant argued that in refusing to allow exemption to the appellant, the respondent acted arbitrarily and irrationally for the following reasons:

(a) the respondent misinterpreted the 2003 circular by imposing a requirement that the certificate of accreditation had to be attained during the appellant's study;

(b) the respondent failed to interpret the 2003 circular consistently with its other circulars, namely the Pekeliling PTPTN Bilangan 1 Tahun 2002 ('the 2002 circular') and the Pekeliling PTPTN Bilangan 1 Tahun 2005 ('the 2005 circular'); and

(c) the respondent failed to consider the true purpose and objective of accreditation.

[29] For the respondent, learned counsel submitted that the learned judge was correct in finding that the decision sought to be quashed by the appellant was a policy decision which the court would generally be reluctant to intervene. Learned counsel echoed the learned judge's finding that based on the 2003 circular, the appellant was not entitled to the exemption as the certificate of accreditation was not attained during her period of study.

[30] Learned counsel also argued that the respondent's decision in rejecting the appellant's application did not suffer from procedural impropriety as the conditions for the exemption had not been satisfied.

OUR FINDINGS

[31] The following were the issues for our determination:

(a) whether the 2003 circular applies to the appellant; and

(b) if the circular applies, whether the respondent's decision in rejecting the appellant's application for exemption was irrational.

[32] Before we proceed with the issues, we wish to deal firstly with the finding of the learned judge that the decision of the respondent involved a policy of the government which would not be appropriate for the court to intervene.

[33] In allowing the appeal against the refusal of the High Court to grant leave, the earlier panel of this court decided among others that the 2003 circular had a force of law as it was made pursuant to the PTPTN Act; that the 2003 circular is thereby regarded as a subsidiary legislation binding on the parties and as such the decision made pursuant to the 2003 circular was amenable to judicial review (see *Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional* [2015] MLJU 213; [2015] 3 AMR 35).

[34] In our view, while the formulation of the 'dasar pinjaman boleh ubah' is a policy, the appeal before us concerned not with the policy per se but the implementation of the said policy. The respondent's interpretation of the 2003 circular had undoubtedly deprived the appellant of the benefit of exemption and more importantly, we found no basis to depart from the earlier findings of this court that the decision of the respondent was susceptible to judicial review. In giving its decision on the exemption of repayment of the educational loan, the respondent was exercising its statutory duty pursuant to s 19 and/or s 49(1) of the PTPTN Act which respectively provides:

19 Power of Minister to give directions

(1) The Board shall be responsible to the Minister.

(2) The Minister may give direction not inconsistent with the provisions of this Act to the Board from time to time.

(3) The Board shall give effect to all directions given under this section as soon as possible.

49 Power to make regulations

(1) The Perbadanan, with the approval of the Minister, may make such regulations as may be expedient or necessary for the purpose of carrying out the provisions of this Act.

(2) Without prejudice to the generality of subsection (1), regulations may be made for prescribing —

(ha) the responsibilities, conditions, and the procedure for the grant of educational loans to any recipient student.

[35] As such we disagreed with the learned High Court judge that the decision of the respondent was a policy decision and that the court ought not to intervene in the policy decision of the respondent.

[36] Coming back to the issue whether or not the 2003 circular applies to the appellant, it was our judgment that the answer lies in the interpretation of the words 'pelajar-pelajar yang mengikuti kursus yang mendapat Sijil Perakuan Akreditasi daripada Lembaga Akreditasi Negara ...' which is found in the first paragraph of the 2003 circular.

[37] In this regard we took the position that the 2003 circular must be given its plain and literal meaning unless the literal construction results in absurdity and injustice. In its plain and literal meaning, the 2003 circular stipulates two conditions to be fulfilled before a graduate of a private institution of higher learning can enjoy the exemption. The first condition is that the graduate must obtain a First Class Honours and the second condition is that the graduate attended a course which attained a certificate of accreditation. Apart from these two conditions, there are no other conditions stipulated in the 2003 circular. To be more specific, the 2003 circular makes no provision as regards the time the certificate of accreditation was obtained.

[38] The respondent's contention which the learned judge agreed was that the appellant was not entitled to the exemption because the certificate of accreditation was obtained after the appellant had completed her study whereas the condition for granting the exemption under the 2003 circular is that the certificate must be obtained during the period of the appellant's study. The gist of the respondent's submission is captured below:

Syarat yang dikenakan bagi mendapat pengecualian bayaran balik pinjaman bagi pelajar IPTS sepertimana yang terdapat di dalam dasar Jemaah Menteri dan Pekeliling 2003 Eksibit E ialah seperti berikut:

(a) Mendapat kelas pertama bagi Ijazah Sarjana Muda; dan

(b) Kursus yang diikuti sepanjang tempoh pengajian mendapat Sijil Perakuan Akreditasi LAN.

[39] Contrary to the submission of learned counsel for the respondent, condition (b) in particular, the words 'sepanjang tempoh pengajian' were not found in the minister's decision (as reproduced by the respondent in its affidavit) which reads:

Bagi pelajar-pelajar IPTS, Menteri Pendidikan meminta supaya pelepasan hanya diberikan kepada pelajar-pelajar yang mengikuti kursus pengajian yang mendapat Sijil Perakuan Akreditasi Negara (LAN). PTPTN hendaklah merujuk kepada Jabatan Pendidikan Swasta sekiranya terdapat keraguan mengenai pemberian Ijazah Kelas Pertama dari IPTS tertentu.

[40] Significantly, the words 'sepanjang tempoh pengajian' as added to by the respondent in condition (b) were also absent in the earlier correspondence exchanged between the respondent and the appellant and neither did condition (b) appear in the respondent's letters to the Public Complaints Bureau.

[41] For ease of reference, we reproduce the relevant letters below. The first is the letter from the appellant to the respondent dated 5 August 2003 wherein the appellant wrote: (*rekod rayuan Bhg* C *Jld* 3 at pp 187–188):

Tuan,

Pelepasan Bayaran Balik Pinjaman bagi Pelajar yang Mendapat Kepujian Kelas Pertama

Perkara di atas dan Pekeliling PTPTN Bilangan 2 Tahun 2003 dirujuk dengan segala hormatnya.

2. Saya seorang pelajar jurusan Undang-Undang yang telah mengikuti kursus LLB yang ditawarkan oleh Univiersiti London di Kemayan ATC dan telah tamat pengajian pada tahun 2002 dengan kepujian Kelas Pertama.

3. Berikutan lawatan saya ke PTPTN baru-baru ini, saya telah diberitahu oleh Encik Hasrul Nizam daripada bahagian IPTS bahawa pelajar yang mendapat kepujian kelas pertama di IPTS boleh memohon untuk pelepasan bayaran balik pinjaman pendidikan.

4. Sehingga tamat pengajian, saya telah menerima sejumlah pinjaman sebanyak RM48,000.00 (Empat Puluh Lapan Ribu Sahaja) walaupun jumlah yang diluluskan untuk permohonan saya adalah sebanyak RM64,000.00 (Enam Puluh Empat Ribu Sahaja).

A 5. Saya ingin memohon jasa baik tuan untuk mempertimbangkan permohonan pelepasan bayaran balik pinjaman sebanyak RM48,000.00 yang disebutkan. Bersama-sama ini, saya sertakan untuk rujukan tuan:

(a) Salinan keputusan peperiksaan setiap semester pengajian (Transkrip)

B (b) Salinan Ijazah Kelas Pertama daripada University of London

(c) Keratan surat khabar *New Sunday Times*, 1st September 2002.

6. Pertimbangan daripada pihak tuan dihargai dan saya dahului dengan ucapan ribuan terima kasih.

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[42] It is pertinent to note that the appellant's assertion in para 3 quoted above was not denied by the respondent. Be that as it may, by its letter dated 13 September 2006, the respondent replied as follows where the respondent made no mention of the condition or requirement that the accreditation must D be attained during the appellant's period of study (*rekod rayuan Bhg* C *Jld* 3 at p 143):

2. Untuk makluman tuan, berdasarkan Pekeliling PTPTN Bil 2 Tahun 2003 'Pelaksanaan pelepasan bayaran balik pinjaman pendidikan bagi pelajar yang mendapat kelas pertama bagi pelajar IPTS adalah terhad kepada pelajar-pelajar E yang mengikuti kursus yang mendapat Sijil Perakuan Akreditasi daripada Lembaga Akreditasi Negara (LAN) sahaja'. (rujuk lampiran)

3. Setelah semakan dibuat, pihak Perbadanan mendapati kursus yang diikuti oleh pihak tuan tidak mendapat sijil Perakuan Akreditasi, maka permohonan tuan tidak dapat dipertimbangkan dan tuan masih tertakluk membayar balik pinjaman yang F dinyatakan di dalam Perjanjian Pinjaman yang telah ditandatangani.

[43] Further, in its letter dated 5 October 2006 to the Public Complaints Bureau the respondent states (*rekod rayuan Bhg* C *Jld* 3 at p 144):

G 2. Adalah dimaklumkan bahawa Perbadanan telah menerima permohonan peminjam pada 5 Ogos 2006. Walau bagaimanapun semakan Perbadanan mendapati permohonan tersebut tidak boleh diproses kerana tidak memenuhi syarat yang telah ditetapkan oleh Perbadanan iaitu tidak mengemukakan salinan sijil Lembaga Akreditasi Negara (LAN). Peminjam telah dimaklumkan mengenai perkara ini melalui surat Perbadanan bertarikh 13 September 2006.

H 3. Dasar Perbadanan telah menetapkan hanya kursus yang diiktiraf oleh Lembaga Akreditasi Negara sahaja yang akan dipertimbangkan untuk pengecualian bayaran balik pinjaman. Sekiranya peminjam mengemukakan salinan sijil LAN yang mengesahkan bahawa kursus beliau mendapat pengiktirafan LAN, maka pihak Perbadanan tidak ada halangan untuk mempertimbangkan permohonan beliau.

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[44] In the above letter, the respondent similarly made no mention of the requirement that the certificate of accreditation must be obtained during the appellant's study. What was mentioned was merely 'kursus beliau mendapat pengiktirafan LAN'. Nothing was stated about 'kursus yang diikuti sepanjang

tempoh pengajian'. We also noted that in its letter to the Public Complaints Bureau, the respondent stated that the appellant's application could not be processed as the appellant failed to forward the certificate of accreditation, when there is no such requirement under the 2003 circular. Paragraph 2 of the 2003 circular reads:

> 2. Untuk membolehkan surat pelepasan bayaran balik dikeluarkan, pelajar-pelajar berkaitan dikehendaki mengemukakan kepada PTPTN dokumen/dokumen berikut yang telah disahkan oleh Bahagian Akademik IPTA atau IPTS masing-masing:
>
> (i) Salinan keputusan peperiksaan setiap semester pengajian.
>
> (ii) Salinan Ijazah Kepujian Kelas Pertama.

[45] Nevertheless, in compliance with the respondent's request, on 19 August 2007 the appellant forwarded the certificate of accreditation to the respondent. The respondent's reply came as follows vide its letter dated 24 September 2007 (*rekod rayuan Bhg* C *Jld* 3 at p 237):

> 3. ... Perbadanan telah menerima permohonan daripada tuan untuk pengecualian bayaran balik pinjaman tetapi tidak memenuhi syarat yang telah ditetapkan. Oleh yang demikian pihak Perbadanan memohon pengesahan sama ada Kursus Bachelor of Law (University of London) bagi tahun 2000 sehingga 2002 (dalam tempoh pengajian pelajar) mempunyai kelulusan Perakuan Akreditasi penuh daripada Lembaga Akreditasi Negara (LAN). Sekiranya kursus tersebut mempunyai kelulusan mohon dilampirkan bersama sijil kelulusan daripada LAN kepada pihak Perbadanan.

[46] That was the first time that the condition 'dalam tempoh pengajian pelajar' was made known to the appellant and which was repeated in the respondent's letter dated 27 October 2006 which reads (*rekod rayuan Bhg* C at p 212):

> 2. Berdasarkan semakan tarikh Perakuan Akreditasi bagi kursus Bachelor of Law (*external*) University of London adalah 27/02/2006 sehingga 26/02/2011. Ini bermakna, Ijazah yang diperolehi sebelum tarikh tersebut tidak mendapat perakuan akreditasi. Oleh kerana permohonan tuan tidak memenuhi kriteria seperti di atas, permohonan tuan tidak dapat dipertimbangkan.

[47] Having regard to the factual matrix and the spirit of the formulation of the policy ie to give recognition to excellent graduates, we formed the view that the focus should be on the words 'kursus yang mendapat Sijil Perakuan Akreditasi ...'. In other words, the accreditation must relate to the course itself and not to the period when the graduate was attending the course. To focus on the date when the certificate of accreditation was obtained would result in unfairness and absurd situation. Take this scenario. A First Class Honours graduate attended the LLB course at Kemayan ATC between 2004–2008. The

A certificate of accreditation covers only part of the graduate's period of study. Going by the respondent's interpretation of the 2003 circular, the graduate would not be exempted under the 2003 circular as the accreditation was not attained 'sepanjang tempoh pelajar menjalani kursus'. Surely this cannot be the intention of the government when the policy 'memberi pengiktirafan kepada pelajar cemerlang' was introduced. There is only one LLB course and we do not think it is rational to sever the course, more so when accreditation is only a formal recognition as defined in s 2 of the Lembaga Akreditasi Negara Act 1996 which reads:

> 'accreditation' means a formal recognition of the fact that the certificates, diplomas and degrees awarded by private higher educational institutions, or by other educational institutions or professional bodies consequent upon a course of study or training programme conducted by a private higher educational institution jointly or in affiliation, association or collaboration with such other educational institutions or professional bodies, are in accordance with the standard set by the Lembaga;

[48] That the focus was not on the timing of the accreditation in our view is fortified by circular 2002 where in granting educational loan, the respondent had imposed the condition that graduates from private institution of higher learning 'telah mendaftar untuk mengikuti kursus peringkat diploma atau Ijazah Sarjana Muda yang diluluskan Lembaga Akreditasi Negara (LAN) dan Jabatan Pendidikan Swasta (JPS), Kementerian Pendidikan'. The fact that the appellant was granted the loan must necessarily mean that the LLB course had in fact been approved by LAN. That the date when the certificate of accreditation was obtained was not significant can also be seen in the 2005 circular amending the conditions for the application of the educational loan where it states:

> 3.1 Syarat-syarat kelayakan memohon pinjaman pendidikan yang dipinda adalah seperti berikut:
>
> (vi) Bagi pelajar-pelajar IPTS, mereka hendaklah telah mendaftar untuk mengikuti kursus yang diluluskan oleh Jabatan Pengurusan IPT (Sektor Pengurusan IPTS), Kementerian Pengajian Tinggi dan telah mendapat Sijil Perakuan Akreditasi daripada Lembaga Kelayakan Negara (LAN). Kelulusan kursus dan Sijil Perakuan Akreditasi hendaklah belum tamat tempoh sah laku semasa permohonan dikemukakan. IPTS yang belum mendapatkan Sijil Perakuan Akreditasi bagi kursus-kursus yang dijalankan masih dibenarkan mengemukakan permohonan pinjaman untuk pelajar-pelajar mereka sebelum 1 Julai 2006.

[49] In our judgment, if it had been the intention of the respondent that the accreditation must relate to the period of study, the respondent would have expressly provided for such requirement in the 2003 circular. In the absence of such requirement, we concluded that it was not the respondent's intention that

the accreditation must relate to the whole period of study. What was intended was the course itself must attain the accreditation.

[50] Consistent with our view, the respondent had in fact explicitly stated the criteria or condition for the application for exemption of the educational loan in its letter dated 31 July 2006 to the Public Complaints Bureau without the condition that the whole period of study must be covered by the certificate of accreditation. The letter reads:

> ... sukacita dimaklumkan berdasarkan peraturan Perbadanan, mana-mana peminjam yang telah memohon pinjaman di peringkat Ijazah Sarjana Muda sebelum 1 Julai 2005 dan mendapat Kepujian Kelas Pertama pada peringkat pengajian yang sama adalah layak untuk memohon pengecualian bayaran balik pinjaman.

[51] Since the appellant had graduated with a First Class Honours in LLB course and had been granted the educational loan before 1 July 2005 for the same course, we held that the 2003 circular applies to the appellant. The appellant had rightly made the application for exemption as she undeniably falls under 'mana-mana peminjam yang telah memohon pinjaman di peringkat Ijazah Sarjana Muda sebelum 1 Julai 2005 dan telah mendapat Kepujian Kelas Pertama pada peringkat pengajian yang sama'.

[52] The respondent contended that the court is bound to accept the explanation given by the MQA that the certificate did not take effect retrospectively. With respect, we were not concerned with the explanation given or the stand taken by MQA. It was our task to interpret the 2003 circular and having regard to all the above, we ruled that the issue of 2003 circular not having the retrospective effect did not arise.

CONCLUSION

[53] The respondent's decision in rejecting the appellant's application for exemption based on the ground that the certificate of accreditation was not obtained during the period of the appellant's study (when the 2003 circular is completely silent on when the certificate was to be obtained) went against the literal and plain reading of the 2003 circular. The respondent in effect was adding an extra condition or requirement to the 2003 circular, namely that the exemption can only apply to graduates who were undergoing their studies after the certificate of accreditation was issued.

[54] On the facts and in the context of the appeal, we found the respondent's decision in rejecting the appellant's application for exemption of repayment of the educational loan, irrational and unreasonable. We therefore unanimously allowed the appeal with no order as to costs.

A *Appeal allowed.*

Reported by Ashok Kumar

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